STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

DAVID RAMIREZ, Appellant, and IOWA DEPARTMENT OF TRANSPORTATION, Appellee.	)	CASE NO. 90-MA-10

PROPOSED DECISION AND ORDER

Jan V. Berry, Administrative Law Judge. In this case Appellant David Ramirez (Ramirez) appeals from the third-step response to his grievance issued by the designee of the director of the Iowa Department of Personnel (IDOP). Ramirez filed his appeal pursuant to §19A.14(1)[1] with Public Employment Relations Board (PERB or Board) on February 2, 1990. He challenges the computation of his pay as an employee of the Iowa Department of Transportation (DOT) for the period September 25, 1987 through August 8, 1988, and alleges DOT's violation of §19A.9(1) and IDOP rules 581-4.5(6) and 581-10.3.

DOT filed a combined answer and motion to dismiss, seeking dismissal on the ground that the appeal raises for the first time an issue which was not presented by Ramirez at any of the earlier steps in the uniform grievance procedure.

Pursuant to written notice, an evidentiary hearing was held before me on October 25, 1990, at PERB's offices in Des Moines, Iowa. At hearing Ramirez appeared pro se. DOT was represented by IDOP counsel Jennifer Weeks-Karns. At that time, both parties were

[1]All statutory citations, unless otherwise indicated, are to the Code of Iowa (1989).

provided full opportunity to present evidence and arguments in support of their respective positions.

At hearing, DOT expanded upon its pending motion by asserting two additional grounds for dismissal: (1) that Ramirez's advancement of his grievance to the IDOP director from the second-step grievance response was untimely, and (2) that his appeal from the third-step response to PERB was untimely. Evidence concerning all three prongs of DOT's motion to dismiss was received at hearing, as was evidence concerning the merits of the dispute. Ruling on DOT's motion was reserved.

Based upon the documents filed with the appeal and DOT's answer, the evidence presented at hearing and the parties' oral arguments, I issue the following proposed findings of fact and conclusions of law.

FINDINGS OF FACT

Ramirez is employed as an Engineering Aide II for DOT. On August 16, 1988, he initiated his grievance by signing and delivering to his supervisor a non-contract grievance form which identified the issue involved as "10.3(4) merit rules" and the date of the complained-of incident as September 25, 1987. His requested remedy was "4.5(6) merit rules."

Ramirez's citations to "merit rules" were intended as references to IDOP rules, 581 Ia.Admin.Code. IDOP subrule 10.3(4), cited by Ramirez, concerns temporary assignments and provides, in relevant part, that an agency's requests for assignment of employees to "special duty" or "extraordinary duty" exceeding three

complete pay periods shall be submitted to the IDOP director. Subrule 4.5(6) concerns pay for such assignments, and provides that requests for additional pay due to an employee's assignment to special or extraordinary duties shall be submitted to IDOP and may be granted under conditions specified therein.

Ramirez's grievance was denied at the first step.[2] He advanced the matter to the second step of the procedure, where his grievance was again denied on September 20, 1988.[3] The record is

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[2]Although Ramirez had only cryptically set forth the nature of his claim on his grievance form, the supervisor issuing the first-step response recognized that it dealt with Ramirez's request for additional pay for his work assignment from September 25, 1987. The responding supervisor, Wayne A. Sunday, wrote:

> In September of 1987, several changes became necessary in survey. With no one available to assume control of a survey crew as a party chief, Dave Ramirez was offered the opportunity to train as a party chief under the direct supervision of the assistant project inspector. This situation of training continued until winter shutdown. After attending Advanced Survey School in March of 1988, the same arrangement was resumed in April of 1988. Progressively, less direct supervision was given during the spring into the summer. It is my opinion this was a training assignment, and Dave Ramirez did not assume the complete responsibilities of a survey party chief until recently. Therefore, I do not believe he has worked out of class more than 25% of the period in question.

[3]The DOT representative responding at the second step wrote:

> Employee training to provide them with background and qualifications for promotional opportunities is necessary to both the organization and the employee. Assignment to a position for training purposes is a common occurrance [sic], and the time frame and amount of direct supervision will vary with tasks and the abilities of the individual. Completion of a training assignment may well be to demonstrate the ability to perform independently and be held responsible and accountable for the work performed.
>
> In checking the process of training Survey

silent as to when Ramirez received the second-step denial.

IDOP subrule 12.1(1) sets out the procedure applicable to Ramirez's grievance, paragraph c thereof providing, inter alia, that if the grievant is not satisfied with the second-step decision, he or she may file the grievance in writing with the IDOP director within 14 days after the second-step decision is received or should have been received.

It appears that Ramirez did nothing further until October 19, 1988, when he attempted to advance the grievance to the third step by sending it to DOT. Apparently DOT thought the document it received was only a courtesy copy of a filing made with IDOP, and took no action on the matter until Ramirez inquired about the status of his grievance. It was then forwarded to IDOP, where it was received on December 15, 1988.

Eventually, on June 8, 1989, a "Third-Step Grievance Answer" was issued by the IDOP director's designee, Beverly J. Abels (Abels), then an IDOP Personnel Management Specialist. That answer, after setting forth the procedural background of the grievance, recited that Ramirez and IDOP had mutually agreed to an extension of the time lines for the third-step meeting and answer.[4]

> Party Chiefs in other locations, the same general sequence has occurred as in yours. There can be a fine line between Training versus Out-of-Class work when the completion of the training period occurs. The Residency management does not feel that normal training process and assignment has been exceeded, and I agree.

[4]IDOP subrule 12.1(1) provides that once a grievance is filed with the director "[t]he director shall, within 30 calendar days after the day the grievance is received, attempt to resolve the

In the third-step proceeding Ramirez apparently maintained that the work he was assigned was normally performed by a Construction Technician I (pay grade 23) while he was classified as an Engineering Aide II (pay grade 18). He argued that this "out-of-class" work violated several internal DOT policies and chapter 114 of the Code of Iowa. In the third-step response, Abels identified three issues for her determination:

> 1. The timeliness of the grievance's filing at the third step;
> 2. Whether Ramirez had been assigned to "special duty" within the meaning of IDOP subrule 10.3(1) and might be eligible or entitled to special duty pay in accordance with IDOP subrule 4.5(6), and
> 3. Whether Ramirez had been assigned to "extraordinary duty" within the meaning of IDOP subrule 10.3(2) and might be eligible or entitled to extraordinary duty pay in accordance with IDOP subrule 4.5(6).

On the issue of the timeliness of the grievance's filing at the third step, Abels noted that the filing took place on October 19, 1988 at DOT, 47 days following issuance of the second-step response. In view of the 14-day third-step filing deadline established by IDOP subrule 12.1(1), she opined that the grievance was "untimely filed at the time it was erroneously sent to the DOT and clearly untimely in its receipt by the Department of Personnel." She added that "[o]n its face, the grievance was not filed timely at the 3rd step."

Despite these apparent conclusions, however, Abels went on to address the "special duty" and "extraordinary duty" issues.

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grievance and send a decision in writing to the grievant with a copy to the appointing authority."

Relying upon the definition of a special duty assignment provided by subrule 10.3(1), she concluded that Ramirez had not received a special duty assignment. However, on the "extraordinary duty" issue, Abels concluded Ramirez had indeed been assigned to extraordinary duty within the meaning of IDOP subrule 10.3(2). She interpreted rule 10.3 as providing that while additional pay for extraordinary duty may be granted, no such payment is required, but that any extraordinary duty assignment exceeding three pay periods, with or without additional pay, must be approved by IDOP. Since DOT had not requested approval of Ramirez's extraordinary duty assignment, which exceeded three pay periods, Abels concluded that DOT had violated IDOP Rules and ordered DOT to file the appropriate request within two weeks. She noted that since DOT had failed to file such a request, "it cannot be assumed that the request would have been either approved or denied. Therefore, the appropriate remedy, if any, for the rule violation cannot be determined until that request has been filed with IDOP." Abels further noted that following DOT's filing of the request, IDOP would determine whether to grant any additional pay for the extraordinary duty Ramirez had performed. The third-step response ended with a recitation of IDOP subrule 12.2(5), which sets forth an employee's right to appeal the response to PERB.[5]

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[5]Paragraph c of IDOP subrule 12.1(1), which addresses the IDOP director's third-step response, provides, in part: "if the relief sought by the grievant is not granted, the director's response shall also incorporate the verbatim content of subrule 12.2(5), including the specific number of days remaining in which an appeal to the public employment relations board must be filed."

As required by the third-step response, DOT requested IDOP approval for Ramirez's extraordinary duty assignment, without additional pay, by letter dated June 29, 1989. DOT subsequently submitted to IDOP a "Special Pay/Appointment Request" form, dated September 11, 1989, again requesting approval of the extraordinary duty assignment without additional pay.

It appears that the third-step grievance response and DOT's subsequent request for retroactive approval of the extraordinary duty assignment spawned what Abels referred to as a "major study" of extraordinary and special duty pay practices, which was not completed for some time.

Although the record is silent as to the dates this "major study" was commenced and concluded, it does reveal that Ramirez telephoned Abels on at least one occasion following issuance of the third-step response. According to Abels, Ramirez called her several times after the third-step record was closed. She testified that Ramirez took issue with several items contained in the response, and that she advised him that he could appeal her response as set out therein.

According to Abels, Ramirez expressed concern about the next phase of the proceeding, which prompted her to advise that he also had grievance rights applicable to the subsequent decision on DOT's application and could follow IDOP procedure to grieve that decision when it was issued. She testified she told Ramirez that should he appeal the third-step response to PERB, then grieve the subsequent decision and proceed with that grievance all the way to a PERB

appeal, the two grievances could, in all probability, be combined for one hearing before PERB. Abels further testified that Ramirez asked that he be allowed to postpone his appeal of the June 8 third-step response until a decision on the DOT application for IDOP approval of the extraordinary duty assignment was issued, and that she advised him that if he wanted an extension of the time in which to file with PERB, he would have to follow IDOP procedure and make a formal request for such an extension. No such request was received from Ramirez.

Ramirez, however, characterized his contact with Abels quite differently. According to his testimony, he called Abels after June 8 to discuss filing deadlines applicable to further proceedings, and was told that a 30-day period in which he could appeal to PERB would commence upon his receipt of the anticipated supplemental IDOP decision addressing DOT's application for approval of his extraordinary duty without additional pay.

On some later date Abels issued what was entitled an "Addendum to Third Step Grievance Decision." That brief addendum recites DOT's filing of its request for approval of Ramirez's extraordinary duty without pay, and indicates that the request was for the periods September 25, 1987 - December 25, 1987 and April 15, 1988 - August 8, 1988.[6] The addendum denied DOT's request for

[6]This description of the periods covered by DOT's request is not borne out by the record. DOT's initial request, by letter dated June 29, 1989, does not mention any specific dates. Its subsequent request, dated September 11, 1989, on the IDOP form, requests approval for the periods September 25, 1987 through November 15, 1987 and April 1, 1988 through August 15, 1988. Although this discrepancy between the DOT request and the addendum

extraordinary duty status without pay, and ordered that Ramirez receive extraordinary duty with pay status for the aforementioned periods. The addendum concludes by directing DOT to process the documents necessary to grant the additional pay retroactively.

The addendum, signed by Abels on behalf of IDOP, was not dated. Abels testified that it was "just before Christmas" in 1989 when the addendum was issued, and that she believes it was date stamped December 22, 1989.[7] She explained her failure to date the addendum as an oversight due to her haste to issue it before Christmas, 1989.

A copy of the addendum offered into evidence by DOT at hearing bears the date, stamped in the upper-right corner of the document, of December 28, 1989. Abels candidly acknowledged that she did not know the significance of that date, although she believed that to be the date the addendum was received by DOT. Ramirez offered no evidence concerning the date of the addendum's issuance.

Ramirez initially testified that he did not know when he actually received the addendum, but when asked about the handwritten notation "Received 1-4-90" which appears on the copy of the addendum he placed into the record, Ramirez indicated that that

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was not directly addressed at hearing, Abels did testify that the dates mentioned in her addendum were determined by her, based upon a consensus reached between Ramirez and DOT at the third-step grievance meeting and upon her review of time sheets made available to her. Although she acknowledged that the dates she utilized may not have been precisely accurate, they were, she felt, an accurate representation of the amount of time that Ramirez worked the extraordinary duty assignment.

[7]In what office Abels believes this "date stamping" occurred is not revealed by the record.

date was, to the best of his knowledge, the date of his receipt of the addendum. He added that he knew, when he submitted his appeal to PERB, that he was "running late on time."

Regardless of the date of its issuance, DOT did process the necessary documents and remit extraordinary duty pay to Ramirez for the time periods specified in the addendum.

Ramirez filed his appeal with PERB on February 2, 1990. He argues that he should receive "special duty pay" for the periods September 25, 1987 to December 25, 1987 and April 15, 1988 to August 8, 1988, and that he should receive "extraordinary duty pay" for the interim period of December 25, 1987 through April 15, 1988.

CONCLUSIONS OF LAW

Three major issues are presented by DOT's motion to dismiss:

1. Whether Ramirez's appeal must be dismissed on the ground asserted in DOT's original motion (that Ramirez, in his appeal to PERB, for the first time takes issue with the dates for which he was granted relief by the director's designee, even though these dates were stated as early as the first step response);

2. Whether the appeal must be dismissed because the grievance was not filed at the third step with the IDOP director in a timely fashion, and

3. Whether the appeal must be dismissed because it was not timely filed with PERB.

I.

Although DOT's original motion to dismiss characterizes the alleged defect in Ramirez's appeal as a failure to "state a cause of action upon which relief can be granted . . .", its position appears to have nothing to do with the adequacy of his appellate pleadings or the legal sufficiency of his theory.

Although not coherently explained in the motion itself and not strenuously argued or explained at hearing, this initial ground for dismissal apparently relies upon two alleged facts: (1) that Ramirez "for the first time on appeal [to PERB] takes issue with the dates for which relief was granted at the third step . . ." and (2) that these dates were stated as early as the first-step response.

As to the claim that Ramirez takes issue with the dates set out in the third-step response "for the first time on appeal" to PERB, my reading of his pleadings and my understanding of his argument do not lead me to the conclusion that he contests the dates at all. Instead, Ramirez claims that the periods for which he received extraordinary duty pay should have been compensated at a higher special duty pay rate, and that during the interim period (for which he received no additional pay of any type) he should have received extraordinary duty pay. No complaint with the dates themselves appears to be expressed.

However, even if Ramirez were taking issue with the dates "for the first time on appeal," I do not understand how this would deprive him of his right to appeal. Obviously he raises his objection to the contents of the third-step response "for the first time on appeal,"--the appeal to PERB was the next logical step for Ramirez to take in his attempt to secure the relief he seeks. How could he possibly have taken issue with the content of the third-step response at an earlier step in the proceeding?

Nor does the other prong of DOT's theory--that the dates

Ramirez supposedly attacks on appeal were stated as early as the first-step response--support dismissal of his appeal. The factual premise for this part of DOT's argument is simply not borne out by the record.[8]

I conclude that the bases upon which DOT's originally-filed motion to dismiss rely are without merit, and provide no basis for dismissal of Ramirez's appeal.[9]

II.

As previously noted, at hearing DOT expanded upon its original motion, asserting two additional grounds for dismissal. The first of those additional grounds is that Ramirez's filing at the third step of the grievance procedure (with the IDOP director) was

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[8]Even a cursory comparison of the first and third-step responses reveals that the dates set forth in the third-step addendum were not specified in the first-step response. The third-step addendum ordered extraordinary duty pay for Ramirez for the periods September 25, 1987 through December 25, 1987 and April 15, 1988 through August 8, 1988. Nowhere in the first-step response are any of those dates specifically mentioned. Although the first-step response does generally refer to events occurring in "September of 1987," "winter shutdown," "March of 1988" and "April of 1988," no specific dates are mentioned.

[9]Even were I to conclude that DOT's originally-filed motion had merit, I would likely deny the motion on procedural grounds. It has been held that Ia.R.Civ.P. 104(b), which requires that motions to dismiss for failure to state a claim be filed before answer, is applicable to §19A.14 appeals such as Ramirez's. Soudabeh Janssens, 90-MA-04. Since DOT's motion seeking dismissal on the alleged ground that Ramirez's appeal failed to "state a cause of action" was not filed before answer, as required by Rule 104(b)[See, e.g. Riediger v. Marrland Development Corp., 253 N.W.2d 915 (Iowa 1977); Powell v. Khodari-Intergreen Co., 303 N.W.2d 171 (Iowa 1981)], it was untimely.

untimely.[10] Apparently, this ground is intended to raise the issue of whether PERB possesses subject matter jurisdiction over Ramirez's appeal.

A tribunal has a duty, on its own motion, to refuse to decide controversies not properly before it, and has the power to determine whether it has jurisdiction of a controversy regardless of the parties' waiver or consent.[11] A claimed lack of subject matter jurisdiction may be raised by pre-answer motion, but such is not an absolute requirement since a tribunal has the aforementioned duty to reject claims over which it has no jurisdiction, whether the matter comes to its attention by suggestion of the parties or otherwise.[12]

However, even construing DOT's claim of untimely filing at the third step as raising the issue of the existence of subject matter jurisdiction in PERB, I conclude that this portion of DOT's motion must also be denied.

The instant case is before me due to the existence of §19A.14, which provides, in relevant part, that if a grievant is not satisfied with the third-step grievance response of the IDOP director, "the employee may, within thirty calendar days following the director's response, file an appeal with the public employment

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[10]IDOP subrule 12.1(1)(c) provides that if not satisfied with the second-step decision, the grievant may, within 14 calendar days after the second-step decision was received or should have been received, file the grievance with the director.

[11]Soudabeh Janssens, 90-MA-04, citing Campbell v. Iowa Beer & Liquor Control Dept., 366 N.W.2d 574 (Iowa 1985).

[12]See Ia.R.Civ.P. 104(a).

relations board . . . ." (emphasis added). The statute contains no provision for an employer's appeal from the director's decision, and grants PERB no jurisdiction to entertain such an appeal or to adjudicate issues decided adversely to the employer with which the grievant expresses no complaint.

In the present case, the timeliness of the grievance's filing at the third step was an issue in the third step proceeding, and was discussed, albeit briefly, in Abels' third-step grievance answer of June 8, 1989. Although Abels, in her decision, clearly stated that "the grievance was not filed timely at the 3rd step", she nonetheless proceeded to decide whether DOT had violated IDOP rules, concluded that DOT had done so, and directed DOT to take steps to remedy its violation. Although her reasoning for not dismissing the grievance on the basis of untimeliness is not clearly stated, the fact that she did not dismiss it, but instead proceeded to the merits and granted relief, can only yield the conclusion that something in the record before her caused her to conclude that Ramirez was excused from compliance with what appear to be mandatory filing periods set out in the uniform grievance procedure.[13]

Abels' decision, apparently rejecting DOT's argument that Ramirez's third-step filing was untimely, was adverse to DOT and was binding upon it, absent some further action which effectively

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[13]See IDOP subrule 12.1(2)(a), to the effect that a grievant's failure to proceed to the next available step within the prescribed time limits constitutes a waiver of any right to proceed further.

reversed that portion of Abels' decision.[14]

By its motion to dismiss based upon the allegedly-untimely filing of the grievance at the third step, DOT is attempting to re-litigate an issue which was decided adversely to it by the director's designee (in essence, pursuing a cross-appeal from the director's decision). Absent some grant of statutory authority for PERB to review IDOP decisions which are adverse to the employer, and are not appealed by the employee, PERB possesses no such jurisdiction. Consequently, I conclude that that portion of DOT's motion to dismiss which relies upon the allegedly-untimely filing of Ramirez's grievance at the third step must be denied.[15]

III.

The final ground for dismissal of Ramirez's appeal urged by DOT's expanded motion is that the appeal was not filed in a timely fashion with PERB, and thus squarely raises the issue of whether

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[14]I need not decide whether Abels' decision constituted final agency action from which DOT could have sought judicial review pursuant to §17A.19, or whether DOT had some other means of recourse from Abels' adverse decision.

[15]This is not to suggest that an issue of timeliness in the processing of a grievance through the pre-PERB steps of the procedure may never be examined in a §19A.14 appeal to PERB. Indeed, in one case, Frances Sinner, 87-MA-06, the PERB adjudicator dismissed a portion of a grievance appeal due to the untimely initiation of the underlying grievance at the first step. That case, however, is clearly distinguishable, for the employer had asserted the untimeliness of the eventually-dismissed grievance during the pre-PERB proceedings, and had prevailed with its untimeliness argument at the third step. The employee's appeal to PERB thus raised the correctness of the untimeliness conclusion reached at the third step, unlike the situation present in the instant case.

PERB possesses subject matter jurisdiction over it.

As discussed in Division II, above, the possible absence of subject matter jurisdiction is an issue which may be raised at any time by the parties or by the tribunal before which the proceeding is pending.

Although the record in the instant case poses disturbing questions concerning how Ramirez's inquiries to Abels were answered, I find myself compelled to conclude that the entirety of Ramirez's appeal must be dismissed due its untimely filing with PERB.

Section 19A.14(1), pursuant to which Ramirez's appeal is prosecuted, clearly indicates that employee appeals from third-step responses be filed with PERB within 30 calendar days following the director's response. I construe the §19A.14(1) language "within thirty calendar days following the director's response . . ." as establishing a 30-day limitations period which commences with the issuance of the IDOP response, rather than with the grievant's receipt thereof.[16]

I also conclude that the 30-day limitation is mandatory and jurisdictional.[17] An administrative agency such as PERB may not enlarge its powers by waiving a time requirement which is

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[16]IDOP subrule 12.2(5) and PERB subrule 11.2(2) are in accord, both providing that the appeal to PERB be filed within 30 calendar days after the director's response was issued or should have been issued.

[17]See PERB subrule 11.2(2), which provides, in relevant part, that appeals from the IDOP director's third-step response in grievance cases must be filed within the 30-day period.

jurisdictional or a prerequisite to the action taken.[18]

The final ground asserted by DOT's motion to dismiss thus involves two separate issues: (1) whether Ramirez's appeal was filed within the mandatory 30-day period, and (2) if not, whether Ramirez has established a basis for being excepted from the requirement that he file within the 30-day period.

Did Ramirez file his appeal within 30 days from the issuance of the director's response? In addressing this question, one must keep in mind the issues raised by Ramirez and entertained at the third step of the process, and determine when decisions on each of those issues were rendered.

As identified in Abels' "Third Step Grievance Answer" of June 8, 1989 (hereinafter "the original response"),[19] Ramirez raised the issues of whether his work constituted a "special duty assignment", whether he was entitled to special duty pay as a result, whether his work constituted an "extraordinary duty assignment" and whether he was entitled to extraordinary duty pay as a result.

Abels' original response determined that Ramirez had not received a special duty assignment within meaning of IDOP Rules and could not be entitled to special duty pay. On the issue of the existence of an extraordinary duty assignment, the original response decided that an extraordinary duty assignment had taken place and that DOT had violated IDOP rules by not requesting its

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[18]Brown v. PERB, 345 N.W.2d 88, 94 (Iowa 1984).

[19]As distinguished from Abels' "Addendum to Third Step Grievance Decision" (hereinafter "the addendum").

approval. The original response directed DOT to file a request for IDOP's approval of the extraordinary duty, and reserved, until after that filing, a decision as to whether extraordinary duty pay would be granted.

The original response, issued June 8, 1989, provided Ramirez with notice of his right to appeal to PERB. Pursuant to PERB rule 1.7 and §4.1(22), the 30-day limitations period for an appeal from the original response commenced on June 9, and the filing of an appeal therefrom was thus required no later than July 10, 1989.[20]

Ramirez filed no appeal with PERB until February 2, 1990. He apparently maintains, however, that since the original decision reserved for later resolution an issue raised by his grievance (his claim for extraordinary duty pay), his "window" for filing an appeal should not be deemed to have opened until Abels' addendum was issued.

Neither PERB nor the Iowa courts have addressed this issue in the context of a §19A.14 appeal. The Iowa Supreme Court has, however, discussed an identical issue in another context.

In Petition of Fenchel, 268 N.W.2d 207 (Iowa 1978), the supreme court was confronted with an appeal from a district court's judgement in a dissolution of marriage action. The district court's original decree dissolved the parties' marriage and decided

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[20]Although the deadline for the appeal normally would have been July 8, 1989, that day fell on a Saturday. Pursuant to §4.1(22), incorporated in PERB rule 1.7 by reference, Ramirez's filing window was extended to include the next day which was not a Saturday, Sunday or legal holiday, thus giving him through Monday, July 10, 1989, to file an appeal from the original response.

questions of child custody, property division and other matters, but also (like Abels' original response) directed that certain tasks be performed, after which the court would render a decision on the issue of alimony. More than six months later, the district court entered a supplemental decree fixing alimony. The ex-husband appealed from the supplemental decree's alimony provisions, and the ex-wife cross-appealed, purportedly from both the original and supplemental decrees. The supreme court was presented with the question of whether it possessed jurisdiction to entertain the ex-wife's appeal from the original decree, which was not filed within the jurisdictional time period established by the Rules of Appellate Procedure.

The supreme court concluded that a decree which reserves a subsidiary issue for future determination is nevertheless a final decree for purposes of appeal, and that if review of the provisions of that decree is desired, an appeal must be taken within the limitations period which begins with the entry of that decree. If the original is supplemented by a later decree, the court held, an appeal from the supplemental decree may be taken, but the appealing party may challenge only its provisions--not those of the original decree.[21]

Although the subject matter addressed by the district court in Fenchel, supra, was distinctly different than that which confronted Abels in the instant case, the procedure employed is almost identical: an original decision was issued which decided some

[21]Petition of Fenchel, 268 N.W.2d 207, 209 (Iowa 1978).

issues but reserved others. Then, after a lapse of time, a supplemental decision on the issues reserved by the original decision was issued. I find the supreme court's reasoning on the jurisdictional question to be persuasive, if not mandatory, precedent, and adopt it for purposes of the instant case.

This means that Ramirez's appeal on the "special duty assignment" and pay questions, decided adversely to him by the original response and not addressed by the addendum, was appealable only within 30 days of the issuance of the original response (i.e., by July 10, 1989). Ramirez's appeal from the adverse decision on the "special duty" questions, not filed until February 2, 1990, was thus untimely.

In his appeal Ramirez challenges not only Abels' original determination that no special duty assignment occurred and no special duty pay was due, but also the addendum's failure to award "extraordinary duty pay" for the period December 25, 1987 through April 15, 1988. Having determined that his appeal on the "special duty" questions was untimely, the question remains whether that portion of his appeal which focuses on the duration of the extraordinary duty pay he was granted--a matter not decided by Abels until the issuance of her addendum--was filed within the jurisdictional 30-day limitations period. I conclude that it was not.

Unfortunately, Abels failed to date her addendum, an oversight which certainly complicates the already-difficult resolution of this matter. The record simply does not establish the date upon

which the addendum was in fact issued, which date started the running of Ramirez's period for appeal. However, I do not believe it is necessary to establish with precision the date upon which the addendum was actually issued, for other evidence in the record leads to the conclusion that Ramirez did not file his appeal within the required 30 days following the addendum's issuance.

DOT's exhibits at hearing included a copy of the addendum which bears a date stamp of "DEC 28 1989", and which Abels speculates was the date the addendum was received by DOT. Whether her speculation as to the origin of the stamped date is correct or not is of little import. The date's significance is its effect of establishing that the signed addendum existed on December 28, 1989, and thus must have been issued no later than that date.[22] Consequently, at the latest, the 30-day period for the filing of the appeal from the addendum commenced on December 29, 1989, and concluded on January 29, 1990.[23] Ramirez's appeal, filed with PERB on February 2, 1990, was thus untimely.

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[22]Although the Appellant may suspect that DOT's exhibit was "manufactured" by affixing the stamped date at a later time, thus creating a false impression as to the date it was stamped, and although I must concede that such dishonesty is within the realm of possibility, no evidence whatsoever exists to even suggest that DOT or its representatives have engaged in any fraudulent behavior with regard to the reproduction and presentation of the exhibit. Although direct testimony concerning the origin of the date stamp would have been desirable, my conclusion that the addendum was issued on or before December 28, 1989 is supported by Abels' testimony that it was issued by her before Christmas, 1989, and no evidence to the contrary appears in the record.

[23]As was the case with the limitations period for an appeal from the original response, the 30-day period for appeal of the addendum actually ended on Saturday, January 27, 1990, but was extended through January 29, 1990 by operation of §4.1(22).

Has Ramirez established a basis for being excepted from the requirement that his appeal be filed within the jurisdictional limitations period? Having determined that Ramirez failed to file his appeal within the two jurisdictional limitations periods applicable in this case, it is necessary to determine whether there is a sound factual and legal basis for excepting him from the requirement that his appeal be so filed.[24] Ramirez must establish a factual and legal basis for being excused from timely filing. The Iowa Supreme Court has consistently held that "the party relying on exceptional circumstances to avoid a statute of limitations must bear the burden of proving the facts which the exception requires."[25]

Ramirez apparently relies upon his conversation with Abels, following her issuance of the original decision, as the legal excuse for the untimely filing of his appeal. As noted earlier, the testimony concerning the substance of that conversation is conflicting. According to Ramirez, he contacted Abels after issuance of the original response to discuss appeal filing deadlines and was told that a 30-day limitations period would commence upon his receipt of the addendum. Abels, however, testified she told Ramirez that if he disagreed with the original response he could appeal it within 30 days, as specified in the response, and that if he had disagreements with the addendum when

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[24]See Brown v. PERB, supra, 345 N.W.2d at 94.

[25]Brown v. PERB, supra, 345 N.W.2d at 94, citing Jacobson v. Union Story Trust & Savings Bank, 338 N.W.2d 161, 164 (Iowa 1983); Franzen v. Deere & Co., 334 N.W.2d 730, 732 (Iowa 1983).

it was issued, he had grievance rights as to that action, and could follow IDOP procedures to grieve the addendum.[26]

Ramirez's apparent position is that he relied upon the information he was given by Abels, filed within 30 days after his receipt of the addendum on January 4, 1990, and that his February 2, 1990 appeal should thus survive attack.[27]

Even assuming, without deciding, that Ramirez's receipt of erroneous information concerning the commencement of an appeal from Abels would constitute a sound legal basis for being excepted from the limitations period, I conclude that Ramirez's appeal must nonetheless be dismissed, for he has failed to establish that prejudicially-erroneous information was given to him.

Ramirez bears the burden of proof, at least by a preponderance of the evidence. Having closely scrutinized the demeanor of both Abels and Ramirez, and after a thorough review of the record, I

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[26]Presumably, the information about grieving the addendum by following IDOP procedures meant commencing a separate grievance at the first step. Abels apparently views the addendum on the DOT application for approval of the extraordinary duty assignment as a separate matter not subsumed within the grievance she heard at the third step, a theory seemingly at odds with the title she actually employed (Addendum to Third Step Grievance Decision), which certainly suggests that it is a supplement to the original decision, rather than a totally separate matter. As suggested by the preceding analysis concerning the time period in which Ramirez was required to appeal from the addendum, it is apparent that I disagree with Abels' view and conclude that the addendum was a supplement to the original decision and was appealable to PERB as such, not a new employer action the challenging of which required the filing of a new, separate grievance.

[27]Obviously, if Abels' statement to Ramirez was precisely as he recalls it, it was erroneous. Both the IDOP and PERB rules implementing §19A.14, mentioned earlier, clearly contemplate the commencement of the limitations period upon <u>issuance</u> of the third step decision, not upon the grievant's receipt thereof.

conclude that, at best, the evidence relating to what information Abels gave Ramirez during their conversation is in equipoise and does not preponderate in favor of a finding that Abels in fact told Ramirez that his 30-day appellate window would open upon his receipt of the addendum.

Both parties to the conversation appear to be credible witnesses, and neither Ramirez nor DOT attempted, much less accomplished, anything even approaching an effective attack upon either witnesses' testimony. Were the burden on DOT, rather than on Ramirez, I would resolve this issue in Ramirez's favor. However, since he clearly must shoulder the burden, and since he has failed to do so by any standard, I conclude that no sound factual basis which supports the proffered legal excuse has been established.[28]

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[28]The conclusion that Ramirez has failed to factually support his theory of excuse in no way constitutes an endorsement of the accuracy of the information which Abels claims to have provided to him. Indeed, it appears that even if Abels' version of the events were to be accepted as true, her communication contained incorrect information.

Abels testified that Ramirez, after being told that he had only 30 days to appeal the original response, asked that he be allowed to postpone his appeal until after the addendum was issued. She further testified that she advised him that if he wanted such an extension, he would have to follow IDOP procedure and formally request it, thus clearly indicating to Ramirez that an agreed waiver of the 30-day limitations period was possible as long as it was formally sought and granted. This was incorrect, for the 30-day limitations period established by §19A.14(1) is a jurisdictional prerequisite for proceedings before PERB, and is not subject to waiver by agreement or acquiescence of parties. Where the idea that IDOP and Ramirez could effectively agree to ignore a PERB jurisdictional requirement came from, one can only speculate, although Abels' claimed reference to "IDOP procedures" suggests that she misunderstood IDOP subrule 12.1(2), entitled "Exceptions to Time Limits."

While it is true that that subrule allows the parties to a

In summary, I have concluded that the first two grounds for dismissal asserted by DOT are without merit, but that its final ground, asserting PERB's lack of jurisdiction based upon Ramirez's untimely filing of his appeal, must be granted and the appeal dismissed.

If Ramirez wished to appeal the adverse decision on the "special duty" assignment and pay issues, he was required to do so within 30 days following the issuance of the original response which decided those issues. He did not. If he wished to appeal from the addendum which established the duration of the relief he was granted, he was likewise required to do so within 30 days following its issuance. Although the date of the issuance of the addendum cannot be fixed with precision, I have concluded that its issuance was no later than December 28, 1989, and that Ramirez's appeal, filed February 2, 1990, was thus untimely.

Further, even assuming that the receipt of erroneous information from Abels would constitute a sound legal basis for being excepted from the mandatory filing deadline, Ramirez has failed to establish by a preponderance of the evidence that he was,

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grievance to extend time periods by mutual written agreement, the subrule, on its face, applies only to "any of the three (3) steps in the grievance procedure," and clearly has no applicability to the "fourth" step--the appeal to PERB.

However, the inclusion of this erroneous information in Abels' claimed statement does not provide an alternate basis upon which I might deny DOT's motion. If the facts are as Abels claims, and had Ramirez relied upon the erroneous information, he would have formally approached IDOP for an extension of his appellate filing period. He did not. Consequently, the erroneous information had no prejudicial effect.

in fact, provided with erroneous information which he relied upon to his prejudice.

Consequently, I conclude that DOT's motion to dismiss must be granted.

ORDER

IT IS THEREFORE ORDERED that the grievance appeal of David Ramirez is hereby DISMISSED.

DATED this 11th day of January, 1991, at Des Moines, Iowa.

PUBLIC EMPLOYMENT RELATIONS BOARD

Jan V. Berry
Administrative Law Judge